Office-Supreme Court, U.S.
FILED
JUL 10 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; BARBARA BERNSTEIN, ILSE BRIEGER, PETER COHON, STUART GARDINER, MILTON GORDON, GARY GRESHER, JUDITH LEFKOWITZ and STEVEN MAYER as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLEES BRIEF

NATALIE E. WEST
City Attorney
Counsel of Record
CHARLES O. TRIEBEL, JR.
2180 Milvia St.
Fifth Floor
Berkeley, CA 94704
(415) 644-6380
Attorneys for Appellees.

STEVEN L. MAYER
650 California St.
Suite 2900
San Francisco, CA 94108
(415) 434-1600

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. Voter Apathy And The Role Of The Initiative In California Political History	7
II. The Berkeley Contribution Limitation Has A Marginal Impact On The Exercise Of Speech And Associational Freedoms	13
III. The Berkeley Ordinance Serves The Compelling Governmental Interest Of Preserving The Integrity Of And Public Confidence In The Initiative	18
Conclusion	25

TABLE OF AUTHORITIES CITED

CASES	PAGE
Abood v. *Detroit Board of Education*, 431 U.S. 209 (1977)	16
Associated Homebuilders v. *City of Livermore*, 18 Cal.3d 582, 135 Cal. Rptr. 41, 557 P.2d 473 (1976)	19
Bates v. *Little Rock*, 361 U.S. 516 (1960)	25
Bishop v. *City of San Jose*, 1 Cal.3d 56, 81 Cal. Rptr. 465, 460 P.2d 137 (1971)	12
Branti v. *Finkel*, 445 U.S. 507 (1980)	16
Brown v. *Superior Court (Citizens Against the Street and Road Tax Trap)*, 5 Cal.3d 509, 96 Cal. Rptr. 584, 487 P.2d 1224 (1971)	22
Buckley v. *Valeo*, 424 U.S. 1 (1976)	2, 5, 8, 11 14, 15, 18, 20 21, 24, 25
California Medical Association v. *Federal Election Commission*, ____U.S.L.W.____ (June 26, 1981)	14, 16, 17, 25
Canon v. *Justice Court*, 61 Cal.2d 446, 39 Cal. Rptr. 228, 393 P.2d 428 (1964)	22
Citizens Against Rent Control v. *City of Berkeley* 27 Cal.3d 819, 167 Cal. Rptr. 84, 614 P.2d 742 (1980)	5, 16
C&C Plywood Corp. v. *Hanson*, 583 F.2d 421 (9th Cir. 1978)	19, 23
Citizens for Jobs and Energy v. *Fair Political Practices Commission*, 16 Cal. 3d 671, 129 Cal. Rptr. 106, 547 P.2d 1386 (1976)	2, 11, 12, 24

CASES — PAGE

Cohen v. *California*, 403 U.S. 15 (1971) 20
Fair Political Practices Commission v. *Superior Court (Institute of Governmental Advocates)*, 25 Cal.3d 33, 157 Cal. Rptr. 855, 599 P.2d 46 (1979) 19
First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 5, 18, 19
Frias v. *Board of Trustees of Ector County*, 584 S.W.2d 944 (Tex.Civ.App. 1979) 23
Gayle v. *Hamm*, 25 Cal. App. 3d 250, 101 Cal. Rptr. 628 (1978) 8
Hardie v. *Eu*, 18 Cal. 3d 371, 134 Cal. Rptr. 201, 556 P.2d 301 (1976) 12, 24
Let's Help Florida v. *McCrary*, 621 F.2d 195 (5th Cir. 1980), *appeal docketed*, No. 80-970 (Dec. 8, 1980) 19, 22, 23
Let's Help Florida v. *Smathers*, 453 F. Supp. 1003 (N.D. Fla. 1978) 23
McRae v. *Califano*, 491 F. Supp. 630, 715 (1980) 15
Mervynne v. *Acker*, 189 Cal. App.2d 558, 11 Cal. Rptr. 340 (1961) 19
Miami Herald Publishing Company v. *Tornillo*, 418 U.S. 241 (1974) 21
Mills v. *Alabama*, 384 U.S. 214 (1966) 20
N.A.A.C.P. v. *Alabama*, 357 U.S. 449 (1958) 17
Ohralik v. *Ohio State Bar Assn.*, 436 U.S. 447 (1978) 17
Pacific Gas & Electric Co. v. *City of Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976) 2
In re Primus, 436 U.S. 412 (1978) 17
Roth v. *United States*, 354 U.S. 476 (1957) 9
Schwartz v. *Romnes*, 495 F.2d 844 (2d Cir. 1974) 23
Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) 20

CODES

CALIFORNIA ELECTIONS CODE
Section 22808 12
CALIFORNIA GOVERNMENT CODE
Sections 12900 et seq. 22
Sections 81000 et seq. 11
Section 81001(a) 12
Section 81002(b) 11
Sections 84100 et seq. 21
Section 84305 21
FLORIDA STATUTES ANNOTATED
Section 106.08(1)(d)(e) 22

Acts

Federal Campaign Act 16

Ordinances

Berkeley Ordinance No. 4700-N.S. 2, 12, 13
Section 100a 12
Section 101 21
Section 206 ..... 14, 16
Section 212 14
Section 217 3
Section 219 13
Sections 400 et seq. 21
Sections 510-518 2
Section 602 ..... 2, 3, 4
Section 605 2

Constitutions

United States Constitution
First Amendment 4, 5, 12, 14, 15
California Constitution
Article 1, Section 2 ..... 4, 5
Article 2, Section 1 12
Article 2, Section 8 12
Article 7, Section 8 12

Law Reviews

The California Initiative Process: A Suggestion for Reform, 48 So. Cal. L. Rev. 922 (1975) 9, 10
R. Diamond *et al.*, 7 Sw.U.L. Rev. 462-3 (1975) 10
J. Skelly Wright, Politics and the Constitution: Is Money Speech? 85 Yale L.J. 1001 (1976) 8

Other Authorities

H. Alexander, Money in Politics (1972) 8
Berkeley Fair Campaign Practices Commission, Report on Campaign Spending in Berkeley Ballot Measure Campaigns, 1977-1980 (May 1981). 13
Berg *et al.*, Corruption in the American Political System (1976) 11

OTHER AUTHORITIES

California Fair Political Practices Commission, CAMPAIGN CONTRIBUTION AND SPENDING REPORT, November 4, 1980, General Election, Issued May 27, 1981 (1980 Campaign Report) 7

California Fair Political Practices Commission's Press Release 81-14, May 28, 1981, released in conjunction with 1980 Campaign Report 7

W. Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA (1950) 9

Key & Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 434 (1939) 9

F. Hichborn, STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1921, at 181 (J. Barry ed. 1922) 10

B. Hyink, S. Brown, & E.T. Thacker, POLITICS AND GOVERNMENT IN CALIFORNIA 125 (7th ed. 1971) 10

D.H. Lowenstein, CAMPAIGN SPENDING AND BALLOT PROPOSITIONS 1981 (prepared for delivery at the annual meeting of the American Political Science Association, September 2-6, 1981, New York City) 11

Mathews, THE BALLOT INITIATIVE, WHOM DOES IT SERVE? L.A. Times Oct. 22, 1972, Section F at 22, col. 1 10

Owens, Constantini & Wechsler, CALIFORNIA POLITICS AND PARTIES 273 (1970) 10

THE INITIATIVE, REFERENDUM AND RECALL (W. Munro ed. 1912) 9

S.D. Lydenberg, BANKROLLING BALLOTS: THE ROLE OF BUSINESS IN FINANCING STATE BALLOT QUESTION CAMPAIGNS, COUNCIL ON ECONOMIC PRIORITIES (1979) 10

R. Mastro, D. Costlow and H. Sanchez, TAKING THE INITIATIVE: CORPORATE CONTROL OF THE REFERENDUM PROCESS THROUGH MEDIA SPENDING AND WHAT TO DO ABOUT IT, 1980 (Published by the Media Access Project) 11

Sacramento Bee, Oct. 11, 1911, at 4, col. 1 9

Shockley, THE INITIATIVE, DEMOCRACY AND MONEY: THE CASE OF COLORADO 1976, (printed in "*Hearings*" at (256-74) 11

S.J. Res. 67, Voter Initiative Constitutional Amendment: HEARINGS ON S.J. RES. 67 BEFORE THE SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMMITTEE ON THE JUDICIARY, 95th Cong. 1st Sess. at 90, 91-92, 98 (1978) 10

THE STATISTICAL ABSTRACT OF THE UNITED STATES, U.S. Department of Commerce, Bureau of the Census 7

R. Winter-Berger, THE WASHINGTON PAY-OFF (1971) 8

D. Wilcox, GOVERNMENT BY ALL THE PEOPLE 66 (1912) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-737

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-MCDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

Appellants,

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; BARBARA BERNSTEIN, ILSE BRIEGER, PETER COHON, STUART GARDINER, MILTON GORDON, GARY GRESHER, JUDITH LEFKOWITZ and STEVEN MAYER as members of the Berkeley Fair Campaign Practices Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

APPELLEES BRIEF

QUESTION PRESENTED

Does a Berkeley Municipal Ordinance which limits the size of contributions to local ballot measure campaigns without limiting or restricting campaign expenditures in such campaigns violate the First Amendment to the United States Constitution?

Parties

The current members of the Berkeley Fair Campaign Practices Commission are:

Barbara Bernstein
Ilse Brieger
Peter Cohon
Stuart Gardiner
Milton Gordon
Gary Gresher
Judith Lefkowitz
Steven Mayer

STATEMENT OF THE CASE

The voters of Berkeley, California, have enacted, by initiative, a comprehensive campaign reform ordinance. The Election Reform Act of 1974 (Ordinance No. 4700-N.S.), *inter alia*, establishes the Fair Campaign Practices Commission to administer the law, requires the filing of periodic campaign statements disclosing receipts and expenditures, and limits contributions to candidate and ballot measure campaigns.[1] Section 602 of that Ordinance provides:

> "No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a

[1] As passed by the voters, the Berkeley ordinance restricted expenditures as well as contributions to ballot measure campaigns. After this Court invalidated expenditure limitations in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the California Supreme Court invalidated statewide expenditure limitations in ballot measure campaigns. *Citizens for Jobs & Energy* v. *Fair Political Practices Commission*, 16 Cal.3d 671, 129 Cal. Rptr. 106, 547 P.2d 1386 (1976). Thereafter, the City of Berkeley repealed the expenditure limitations, Sections 510-518. Although those sections are quoted in the Appendix to the Jurisdictional Statement at A-77-79, they are not in force and are not at issue in this action. In addition, the measure originally prohibited corporate and labor union contributions to both candidate campaigns and ballot measure campaigns. Section 605, to the extent that it prohibited corporate and labor union contributions to ballot measure campaigns, was invalidated in *Pacific Gas & Electric Co.* v. *City of Berkeley*, 60 Cal. App. 3d 123, 131 Cal. Rptr. 350 (1976). The section continues to prohibit corporate and labor union contributions to candidate campaigns.

> single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250)".

The term "measure" is defined in section 217 to mean:

> "any City Charter amendment, ordinance or other proposition submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purpose of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot."

At the April 19, 1977 municipal election, the voters of Berkeley voted on a proposed charter amendment initiative concerning rent control. Appellant Citizens Against Rent Control (hereinafter "CARC") is a campaign committee that opposed the measure. The campaign committee developed a budget of just over $100,000. By mid-March 1977, a month before the election, CARC had raised over $108,000 from more than 1,300 contributors. (J.A. 32)[2] Because its budget had been reached, the Committee completely ceased fundraising during the last month of the campaign. (J.A. 33) Of the 1,300 contributors, CARC received only nine contributions in excess of the $250 limit. Such contributions included $5,000 from the California Association of Realtors (J.A. 37); $1,000 from Mason McDuffie Company (J.A. 26); $5,000 from the Berkeley Board of Realtors, (J.A. 30); $5,000 from the Apartment Political Action Committee (J.A. 39); $1,000 from the Miramonte Company (J.A. 42); $2,000 from the B/G Management Company (J.A. 48); $1,000 from the Southern Alameda County Board of Realtors (J.A. 45), and two additional contributions that are not identified in the record totalling $850. (J.S. App. A-87-88)[3] The contributions in excess of $250 totalled $20,850.

---

[2] References to the Joint Appendix are cited as J.A. References to the Appendix to the Jurisdictional Statement are cited as J.S. App.

[3] Prior to the election, a controversy arose concerning Berkeley's intent to enforce the $250 contribution limit contained in Section 602 because certain portions of the Election Reform Ordinance had been declared unconstitutional in previous litigation. *See* note 1 *supra.* In revising the Ordinance to comply with the Court decisions, the City had mistakenly labelled Section 602 with the notation "Do Not Enforce." (J.S. App. A-86). On January 12,

(Footnote continued on following page)

On March 30, 1977, the Fair Campaign Practices Commission found that CARC had violated section 602 by accepting the aggregate sum of $18,600 in contributions exceeding $250. (J.S. App. A-88) CARC responded by filing a complaint for injunctive and declaratory relief against the City and the Commission, contending that Section 602 violated its rights of freedom of speech and association under the California and United States Constitutions and violated the rights of other named plaintiffs, who had made contributions larger than $250. (J.A. 1) Two weeks before the election, the trial court granted a temporary restraining order against enforcement of the contribution limitation. (J.A. 50) However, CARC had ended all fund raising almost a month before the election and did not raise additional funds during this period. (J.A. 33) The campaign against the initiative was successful and the proposed charter amendment was defeated.

After the election, CARC amended its complaint to allege that it had accumulated a campaign debt of approximately $8,000 and it sought to solicit large contributions to satisfy this debt. (J.A. 54) CARC then moved for summary judgment on the ground that section 602 was invalid on its face. (J.A. 64) The superior court granted the motion and rendered a judgment declaring that section 602 violated the First Amendment to the United States Constitution and Article I, Section 2, of the California Constitution. (J.A. 79) On appeal, the California Supreme Court reversed the judgment, concluding that "the Berkeley ordinance is necessary to the accomplishment of compelling governmental interests, and uses the least restrictive means to achieve those ends. It violates neither the First

---

(Footnote continued from previous page)

1977, the City Attorney advised the Fair Campaign Practices Commission in a public meeting that Section 602 had not been invalidated by previous litigation but that enforcement of the section should be given prospective application because of the misleading annotation. The City then eliminated the erroneous annotation and commenced public distribution of the revised Ordinance on January 24, 1977. (J.S. App. A-87). After the Commission's action on January 12, 1977, CARC solicited contributions in excess of $250 (J.A. 24, 26, 29, 33, 37, 39, 42, 48). The City takes the position that CARC had notice that the Ordinance would be enforced as of January 12. CARC contends that enforcement of the Ordinance should begin on January 24, 1977, when the revised Ordinance was released for public distribution. The issue is not before the Court in this appeal.

Amendment nor Article I, section 2, of the California Constitution." *Citizens Against Rent Control* v. *City of Berkeley* 27 Cal.3d 819, 832, 167 Cal. Rptr. 84, 614 P.2d 742 (1980).

This appeal follows.

SUMMARY OF ARGUMENT

The City of Berkeley does not dispute that contribution limitations implicate fundamental interests of speech and association and must be supported by sufficiently important governmental interests. But this is merely the beginning and not, as appellants would have it, the end of the inquiry, for general declarations concerning the importance of First Amendment rights do not decide specific cases. To decide this case, the extent of the contribution limit's impingement on First Amendment rights must be weighed against the interests served. *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

The Berkeley contribution limitation imposes no more than a marginal restriction on protected rights. The ordinance does not restrict the quantity or content of political speech. Unlike the Massachusetts statute invalidated in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), the Berkeley ordinance does not completely prohibit political expression. Any person may contribute $250 for or against any ballot measure. If the person wishes to spend more than $250, he must make expenditures, not contributions, but the expenditure of funds is not limited or otherwise controlled. In addition, the contribution limitation does not restrict any individual's ability to become personally involved in the campaign because volunteer personal services and incidental costs are not included as "contributions" under the ordinance.

Contribution limitations also implicate the freedom of association. However, the impact of Berkeley's ordinance on association by contributors is unsubstantial. The contribution limitation leaves the political contributor free to become a member of any political committee, to make monetary contributions cumulating $250 to support or oppose any measure, and to become personally involved in the campaign.

The record in this case shows clearly that the contribution limitation does not prevent contributors from pooling their funds to engage in effective advocacy. The appellant campaign committee raised sufficient funds to meet its campaign budget a month before the election and completely ceased fund raising during the last month of the campaign. Perhaps the clearest indication that the committee was able to communicate its point of view effectively is the fact that the rent control measure which it opposed was defeated.

The ordinance's relatively slight infringement on protected rights must be weighed against the governmental interests of maintaining the viability of the initiative and referendum. The contribution limitation seeks to assure a well informed electorate and to encourage active participation in the electoral process by limiting, not prohibiting, campaign contributions. These interests are different from, but just as significant as, state interests in candidate campaigns. The contribution limitation results in broader public participation because committees must broaden their base of support to raise funds for a political campaign. The limitation also has an indirect impact in that more people will participate in the electoral process if they believe their participation, whether in the form of money or services, is significant. It encourages greater diversity in election campaigns because entities who want to spend substantial amounts of money must communicate directly with the electorate, rather than aggregating their contributions in a single campaign committee which in turn converts the funds into speech. Finally, the contribution limit promotes the public interest in disclosure because the identities or persons who make expenditures will be communicated directly to the voters. When contributions are not limited, the campaign is usually run by a single campaign committee whose name gives little indication of the actual sources of funds.

Because Berkeley's contribution limitation promotes compelling governmental interests of maintaining the viability of the initiative process without unduly infringing on protected rights of speech and association, the California Supreme Court upheld the ordinance. Appellees respectfully request that the decision be affirmed.

ARGUMENT

I

VOTER APATHY AND THE ROLE OF THE INITIATIVE IN CALIFORNIA POLITICAL HISTORY.

Our generation is witnessing the continuing erosion of confidence in government and participation in the democratic process. Every study shows a steady decrease in voter turnout and growing dissaffection with the role of the individual in the political system.[4] The citizens of Berkeley are among the most politically active in the nation and yet, even in this community, voter turnout in municipal elections has decreased steadily from 65.9% in April 1973 to 45.6% in April 1981.[5]

Individual citizens are not only failing to vote, they are also contributing less to political campaigns. In California, the state Fair Political Practices Commission has reported that campaign contributions from private individuals in the November 1980 general election totaled only one half of the individual contributions given during the 1978 general election and represented only 5% of all contributions made. In 1978, individuals made contributions totalling $2,043,364. In 1980, the total individual contributions were $868,095, representing a 58% decrease.[6] A statement accompanying release of the campaign finance information highlighted the steady decline of private participation, and quoted the chairman of the state commission as saying:

> "These figures illustrate the alarming yet steady erosion of the private individual as a force in the political process . . . What it may portend is an undermining of a basic principle of our type of democracy"[7]

---

[4] Since 1960 voter turnout in presidential elections steadily declined from 62.8% to 51.8%. THE STATISTICAL ABSTRACT OF THE UNITED STATES, U.S. Department of Commerce, Bureau of the Census for the year of each presidential election, lists voter turnout as follows: 1960-62.8%; 1964-61.9%; 1968-60.9%; 1972-55.5%; 1976-54.3%; 1980-51.8%.

[5] Municipal elections are held in April of every odd numbered year. Berkeley Charter, Section 4. Official voter turnout statistics are on file with the Office of the City Clerk, Berkeley, California. The city's population and number of registered voters have remained relatively constant during the same period.

[6] California Fair Political Practices Commission, *Campaign Contribution and Spending Report.* November 4, 1980, General Election, Issued May 27, 1981. (1980 Campaign Report).

[7] California Fair Political Practices Commission's Press Release 81-14, May 28, 1981, released in conjunction with 1980 Campaign Report.

The reasons for this lack of participation do not lend themselves to neat characterization, yet commentators document the widespread perception that the political system is dominated by moneyed interests. Citizens believe, and recent events tend to substantiate the view, that contributors who pump large amounts of money into political campaigns obtain access to and perhaps domination of elected officeholders.[8]

At the same time, our electronic age has made campaigning a sophisticated neo-science dependent on elaborate polling techniques, slick media campaigns and computer mailings.[9] All of which are very expensive and undoubtedly effective, but which have created a technique of political salesmanship based more on merchandising a product than informing the public.[10]

Against this background of current disillusionment with the contemporary political scene, California's right of direct democracy through the exercise of initiative, referendum and recall takes on added significance. In the words of a California appellate court:

> We take judicial notice of the fact that a large cross-section of the citizenry entertains an opinion that the government is no longer representative of the people. It takes outlandish financial resources to mount a campaign for office, lobbyists play no small part in controlling the destiny of legislative measures, and in election years our elected representatives procrastinate taking action even on urgent matters. *One counter-balance to this trend is to give vitality to the initiative power.* (emphasis added) Gayle v. Hamm, 25 Cal. App. 3d 250, 257-8, 101 Cal. Rptr. 628 (1978)

Any analysis of this case requires an understanding of the unique role that the initiative has played in California politics since it was first passed by the voters. It was adopted as a means of restoring political power to the people and is today perceived as the most powerful tool by which the voters may demand accountability in government.

---

[8] See *Buckley* v. *Valeo*, 424 U.S. at 27. See R. Winter-Berger, THE WASHINGTON PAY-OFF (1971).

[9] H. Alexander, MONEY IN POLITICS 1972.

[10] See J. Skelly Wright, *Politics and the Constitution: Is Money Speech?* 85 Yale L.J. 1001, 1011-12 (1976).

Prior to adoption of the initiative, the Southern Pacific Railroad's political machine completely dominated selection of United States Senators, governors and state legislators.[11] It was said that party conventions merely ratified the decisions of railroad attorneys. The railroad had a strong hand in many local governments and controlled newspapers as well as public officials.[12]

In short, California's political process before 1911 was hardly one which encouraged the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth* v. *United States*, 354. U.S. 476, 484 (1957). Although the political energies of the period were manifest and interest groups' freedom to pool resources was unfettered, government was not responsive to the will of the people. By adopting the initiative, referendum and recall, the voters communicated their desire to "kick the Southern Pacific out of politics in the State of California."[13] It was believed that the initiative would provide an avenue for aid to the poor and minorities which had been foreclosed by corporate interests[14] and would encourage broader public discussion of the issues and increased participation in the political process.[15] In addition, initiatives would encourage drafting of laws by those with firsthand information and would thereby elicit alternative solutions to the problems of the period.[16]

On the day following the voters' overwhelming approval of the initiative amendment, an editorial in the Sacramento Bee proclaimed that the initiative process would become a "tool for change, comparable to the right to vote."[17] A decade later,

---

[11] Key & Crouch, THE INITIATIVE AND REFERENDUM IN CALIFORNIA 434 (1939).

[12] *The California Initiative Process: A Suggestion for Reform* 48 So. Cal. L. Rev. 922, 923, n.5. (1975)

[13] In November 1910, the Lincoln-Roosevelt League candidate, Hiram Johnson, was elected governor primarily on his campaign to "kick the Southern Pacific out of Politics in the State of California." See Key & Crouch, *supra* note 11 at 434. See generally W. Crouch, *The Initiative and Referendum in California* (1950); *The Initiative, Referendum and Recall* (W. Munro ed. 1912).

[14] D. Wilcox, *Government by All the People* 66 (1912).

[15] W. Muntro, *supra* note 13, at 21.

[16] *Id.*

[17] Sacramento Bee, Oct. 11, 1911, at 4, col.1.

California political historians confirmed that prediction and noted adoption of the initiative as a turning point in California's political history.[18]

President Wilson's famed characterization of the initiative as a 'gun behind the door' to keep political bosses and legislators honest has proved to be an apt description of California's initiative during the past seventy years.[19] Voters have utilized the initiative to overcome legislative inaction concerning issues as diverse as taxation, the death penalty, political reform, and land use.[20]

Despite the intended purpose of direct democracy, in recent years there has been widespread perception that the initiative, intended as the strongest tool by which the people could retain control over the political process, can be manipulated by the modern equivalents of the economic forces it was intended to control.[21] Large corporations have poured enormous amounts of money into the process, both in support of and opposition to ballot measures that potentially affect their economic interests.[22]

---

[18] F. Hichborn, *Story of the Session of the California Legislature of 1921*, at 181 (J. Barry ed. 1922). "From the day of their defeat at the primary polls in August, 1910, the reactionary elements began their planning to get back into power. The principal barriers in their way are the direct primary, the referendum, the recall, the initiative. Of the four, the initiative has been found to be the most important arm of the people against vice, special privilege, extortion, and the corruption that comes from the political combination of the three. The People might lose all the others, but as long as they retain the initiative they have the power to regain them by their own petition and own vote, regardless of who may control their legislature."

[19] Mathews, *The Ballot Initiative, Whom Does it Serve?* L.A. Times Oct. 22, 1972, Section F at 22, col.1.

[20] Between 1911 and 1972, 152 proposals were submitted to the voters. 48 So.Cal.L.Rev., *supra* note 12, at 927, n.29. See generally B. Hyink, S. Brown, & E.T. Thacker, POLITICS AND GOVERNMENT IN CALIFORNIA 125 (7th ed. 1971).

[21] Eg., S.J. Res. 67, Voter Initiative Constitutional Amendment: *Hearings on S.J. Res. 67 Before the Subcomm. on the Constitution of the Senate Committee on the Judiciary*, 95th Cong. 1st Sess. at 90, 91-92, 98 (1978) (hereinafter "*Hearings*"). R. Diamond *et al.*, 7 Sw.U.L.Rev. 462-3 (1975). Owens, Constantini & Wechsler, CALIFORNIA POLITICS AND PARTIES 273 (1970).

[22] S. D. Lydenberg, *Bankrolling Ballots: The Role Of Business in Financing State Ballot Question Campaigns, Council on Economic Priorities* (1979). The survey details corporate participation in sixteen ballot measure campaigns, each in a different state, during 1978. See Brief for the City and County of San Francisco as Amicus Curiae at 21 *et seq.*

The City of Berkeley does not contend that there is a direct correlation between money spent and outcome of local ballot measure campaigns. Appellees acknowledge that voting decisions result from a complex interplay between information the voter receives during the campaign and his pre-existing ideas and opinions. Nevertheless, there is a widespread public perception that large amounts of money skew the outcome of ballot measure campaigns and these perceptions are supported by several recent studies.[23] Professor Daniel H. Lowenstein, Acting Professor of Law at the University of California, Los Angeles, has completed a systematic study of statewide ballot measures in California between 1968-1980 in which he concludes that one sided spending is ineffective when it supports the proposition but is dominant when it opposes a measure.[24]

In June 1974, the voters of California expressed their dissatisfaction with the perceived impact of money on contemporary politics and enacted, by initiative, the Political Reform Act, Cal. Gov. Code Sections 81000 *et seq.* (West 1976), the most comprehensive political reform package since the adoption of the initiative in 1911.[25] In the same election, the citizens

---

[23] Berg *et al.*, CORRUPTION IN THE AMERCIAN POLITICAL SYSTEM (1976); Shockley, *The Initiative, Democracy and Money: the Case of Colorado* 1976, (printed in "*Hearings*" at (256-74). R. Mastro, D. Costlow and H. Sanchez, *Taking the Initiative: Corporate Control of the Referendum Process Through Media Spending and What to do About It* 1980 (Published by the Media Access Project).

[24] D. H. Lowenstein, *Campaign Spending and Ballot Propositions* 1981 (prepared for delivery at the annual meeting of the American Political Science Association, September 2-6, 1981, New York City). Lowenstein notes that of the fifteen propositions supported by significant one sided spending, seven were successful and eight were defeated. On the other hand, of the ten propositions opposed by significant one-sided spending, none were defeated and only one was successful. He defines "significant one sided spending" to be spending which exceeded $250,000 and which was at least twice as high as spending on the opposite side.

[25] One of the purposes of the Political Reform Act is that "the amounts that may be expended in statewide elections should be limited in order that the importance of money in such elections may be reduced." Cal. Gov. Code Section 81002(b). (West 1976). The Act limited expenditures in statewide ballot measure campaigns and in campaigns to qualify measures for the ballot. Following *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the California Supreme Court held the California expenditure limitations unconstitutional in *Citizens for Jobs and Energy* v. *Fair Political Practices Commission*, 16 Cal. 3d

(Footnote continued on following page)

of Berkeley passed a local analog of the state act, the Berkeley Election Reform Act of 1974.[26] In the very first section of both acts, the voters noted a major reason for their disaffection and declared that "state and local governments should serve the needs of all citizens equally, without regard to their wealth." Cal. Gov Code § 81001(a) (West 1976); Ordinance No. 4700-N.S. Section 100 a.[27]

It is not only the absence or presence of large contributions in ballot measure campaigns which will be decided in this lawsuit, but whether this court will repudiate the voters' direct, though prudent, response to the cooptation of the initiative process by special interests. Such a decision would in a single stroke return to the voters all of the frustration with the political process which they vented in 1974 by enacting the Political Reform Act and the Berkeley Election Reform Act.

(Footnote continued from previous page)
671, 129 Cal. Rptr. 106, 547 P.2d 1386 (1976) and *Hardie* v. *Eu*, 18 Cal. 3d 371, 134 Cal. Rptr. 201, 556 P.2d 301 (1976). The state act does not limit contributions. Consequently, the only contribution limitations currently in effect in California are those contained in local ordinances.

[26] The power of the City of Berkeley to regulate local elections is not questioned. Berkeley is a charter city with power to make and enforce all necessary regulations with respect to its municipal affairs. *Bishop* v. *City of San Jose*, 1 Cal.3d 56, 81 Cal. Rptr. 465, 460 P.2d 137 (1971). Even if Berkeley were not a charter city, it would have the power to limit contributions pursuant to Section 22808 of the California Elections Code which provides: "A city may by ordinance or resolution limit campaign contributions in municipal elections." (West 1977). Thus, the question is not the power of the City to legislate but whether the Ordinance impermissibly interferes with First Amendment freedoms.

[27] The California Constitution contains several provisions which provide the basis for the voters' actions of adopting the state and local political reform acts. Cal. Const. Art. 2, Section 1 provides "All political power is inherent in the people. Government is protected for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require." Art. 2, Section 8 sets forth the right of initiative; Art. 7, Section 8 (West Supp. 1981), provides:

> "The privilege of free suffrage shall be supported by laws regulating elections and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practice."

II

THE BERKELEY CONTRIBUTION LIMITATION HAS A MARGINAL IMPACT ON THE EXERCISE OF SPEECH AND ASSOCIATIONAL FREEDOMS.

Under the Berkeley ordinance, any person[28] may make campaign contributions totalling $250 for or against any ballot measure. The vast majority of contributors to Berkeley campaigns contribute less than $250. These individuals are not affected in any way by the limit.[29] Any person who wishes to spend more than $250 in a Berkeley ballot measure campaign must make expenditures, instead of additional contributions. That is, after contributing $250 in support of or opposition to a ballot measure, the individual must spend his funds to express his views directly to the electorate rather than donate his funds to others.[30] The contribution limitation does not censor or suppress the content of a contributor's political speech. It limits only the extent to which a contributor can pay for the speech of another; speech that the contributor himself neither composes, nor publishes, nor controls.

At the outset, it is important to distinguish the meaning of "contribution" from "expenditure" because the ordinance limits contributions but does not restrict expenditures. The term

---

[28] "Person" is broadly defined in Section 219 to include corporations and labor unions. 'Persons' means an individual, proprietorship, firm partnership, joint venture, syndicate, business trust, company corporation, association, committee, and any other organization or group of persons acting in concert."

[29] For example, CARC raised funds from over 1300 contributors. Of these, only nine contributors donated funds in excess of the $250 limit. (J.A. 26, 30, 37, 39, 42, 45, 48; J.S. App. A-87-88). A City of Berkeley campaign spending report reveals that contributions in excess of $250 were made in campaigns involving only five of the nineteen measures that appeared on the ballot between 1977-1980, the period that the contribution limitation was not enforced. Berkeley Fair Campaign Practices Commission, *Report on Campaign Spending in Berkeley Ballot Measure Campaigns, 1977-1980* (May 1981).

[30] Placing a newspaper advertisement in one of the community's daily newspapers is perhaps the most common way that a Berkeley citizen would spend money to communicate with other voters. A half page political ad costs $854 in the Berkeley Independent & Gazette and $360 in the Daily Californian.

"contribution" refers to the funds received by a political committee from an individual, group or another campaign committee.[31] These contributions constitute a common fund from which expenditures are made. Thus, the person or entity making the contribution does not exert control over the manner in which his or her contribution is eventually spent.

By contrast, an expenditure refers to spending over which the holder of funds has control.[32] Expenditures consist of the purchase of goods and services by which a campaign is conducted including media time, printing costs and other disbursements required by "virtually every means of communicating ideas in today's mass society." *Buckley* v. *Valeo,* 424 U.S. at 19.

Although both contributions and expenditures implicate protected First Amendment interests, restrictions on expenditures impose significantly more severe restrictions on political expression than do limitations on financial contributions. *Buckley* v. *Valeo,* 424 U.S. at 23. In the recent decision of *California Medical Association* v. *Federal Election Commission,* ____U.S.L.W.____ (June 26, 1981), the Court reiterated its holding in *Buckley.* "[T]he 'speech by proxy' that CMA seeks to achieve through its contributions to CALPAC is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection. . . ." Slip opinion at 12.

In *Buckley,* the Court set forth some of the reasons that a contribution limitation only marginally restricts communication by the contributor, stating "a limitation on the amount of money a person may give to a campaign organization involves little direct restraint on his political communication but does not in any way infringe on the contributor's freedom to discuss. . . issues" and, "the transformation of contributions into political debate involves speech by someone other than the contributor." Thus, the contribution limitation in no way restricts the contributor's right to speak or to spend funds on political expression. 424 U.S. at 21.

---

[31] "Contribution" is defined in Section 206 of the Ordinance. J.S. App. A-60.

[32] "Expenditure" is defined in Section 212 of the Ordinance. J.S. App. A-62.

Despite the express language of *Buckley*, appellant Citizen's Against Rent Control and their *amici* assert that limiting contributions will muffle or stifle their political speech.[33] They attempt to distinguish the Court's analysis in *Buckley* by arguing that a contribution to a ballot measure campaign is closer to pure speech than a contribution to a candidate campaign because a ballot measure contribution expresses the contributor's opinion with respect to a single issue. (A.B. at 13) The assertion is no more true in this case than in a candidate campaign, for ballot measure campaigns, like candidate campaigns, may involve a single issue or numerous issues. For example, the rent control measure opposed by CARC raised a number of issues. Contributors to CARC may have been communicating views as diverse as a rental property owner who feared loss of income, a home owner who believed that rent control would diminish the property tax base thereby reducing municipal services, or a student who was concerned about reduction in rental housing supply.[34] Contributors may have included persons who favored rent control but did not support the particular proposal. The contributions served as a general expression of their opposition to the measure but did not communicate the underlying basis of each contributor's position. Conversely, certain ballot measures may involve only a single issue, but candidates, too, run for office on a single issue. E.g., *McRae* v. *Califano*, 491 F. Supp. 630, 715 (1980). A contribution to a single issue ballot measure is no more "pure speech" than a contribution to a single issue candidate. The First Amendment rights of a contributor are not infringed by limitations on the amount he may contribute to a campaign

---

[33] Appellants seem to confuse "expenditures" and "contributions" and, as a result, much of their analysis is fallacious. For example, Appellants' Brief at 9 correctly states that contributions are a form of political speech, but then relies on a paragraph from Buckley regarding *expenditures*, not *contributions*. "A restriction on the amount of money a person or group can *spend* on political communication during a campaign necessarily reduces the quantity of expression . . . (emphasis added) *Buckley* v. *Valeo* 424 U.S. at 19, quoted in A.B. at 9-10. Appellants fail to acknowledge that there is no restriction whatsoever on the amount that they can *spend* in a campaign.

[34] *See* declaration filed by Donald Solem, the professional campaign management consultant retained to manage the "No on Proposition B" campaign. (J.S. 33). *See also*, declaration filed by M. R. Griffin, Mason-McDuffie Company (J.A. 25).

organization whether the campaign organization expresses a view on a single issue or on many issues. *California Medical Association* v. *FEC, supra,* slip opinion at 14.

Like the Federal Campaign Act, the Berkeley ordinance limits one means of associating with a campaign committee but leaves the contributor free to become a member of any political committee and to make monetary contributions cumulating $250 to support or oppose any measure.[35] In addition, the contributor may participate personally in all of the campaign committee's efforts relating to the measure.[36] Appellants and all who want to associate with them can engage in research, discuss campaign strategy, poll voters by walking precincts or making telephone calls, coordinate mailings and solicit others to contribute funds without restriction. As the California Supreme Court held,

> "[U]nder the Berkeley Ordinance anyone who wishes to do so may join and work for any committee supporting or opposing a ballot measure. This is the heart of the freedom to associate. . . ." *Citizens Against Rent Control* v. *City of Berkeley,* 27 Cal.3d at 830.

At least four of the nine entities who made contributions in excess of $250 were membership associations whose members all could have contributed directly to CARC. For example, the California Association of Realtors, composed of 100,000 realtors of whom 450 live in Berkeley, contributed $5,000. (J.A. 37) The realtor's association claims that the contribution

---

[35] This court has not expressly extended the freedom of association to entities that are not natural persons, e.g. *Branti* v *Finkel,* 445 U.S. 507 (1980), individual members of a political party; *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977), members of a labor union. In the instant case, none of the contributors who gave or sought to give contributions in excess of $250 was a natural person. *See* text, supra at note 3. They were all seeking to promote a direct economic interest by defeating the ballot measure. Appellees question whether these entities should be afforded associational freedoms to the same extent that the Court has protected the freedom of association of individuals in our society.

[36] Volunteer activities and incidental expenses are excluded from the definition of "contribution." "[C]ontribution' shall not include a gift of service or labor, . . . nor shall the term 'contribution' include a gift of the use of personal or real property where the value of such use is not in excess of $50, nor shall it include food and beverages the value of which for any one event is no more than $50." Ordinance No. 4700-N.S., Section 206.

limitation restricts its freedom of association with CARC and other contributors, but this court has reached a contrary result in an analogous factual situation. *California Medical Association* v. *Federal Election Commission, supra.* The California Medical Association is an association of approximately 25,000 doctors; CALPAC is a separate legal entity. The associational implications of the case did not even merit consideration by this Court when it held CMA could not contribute more than $5,000, the maximum allowed by federal law, to CALPAC. Similarly, the California Realtors Association and other membership organizations cannot claim a restriction on their freedom to associate that is comparable to that of an individual who seeks to participate in a campaign. Their right of association, if any, is so attenuated that it is entitled to only "a limited measure of protection, commensurate with its subordinate position on the scale of First Amendment values." Compare *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) with *In re Primus,* 436 U.S. 412 (1978).

The contribution limitation does not prevent campaign committees from aggregating large sums of money to promote effective advocacy. The record in this case demonstrates that the ability of CARC, the recipient political committee, to carry on an effective campaign was not impaired by the contribution limitation. The campaign committee developed a budget of approximately $100,000 and raised almost $90,000 from over 1,300 contributors who complied with the statutory limit. Because its budget had been reached, the committee completely ceased fund-raising during the last month of the campaign, a period when presumably it could have raised additional funds. Perhaps the clearest indication that the committee was able to communicate its point of view to the electorate effectively is the fact that the rent control measure was defeated. Thus, the contribution limitation did not in this case prevent contributors from joining with others who share similar ideas and engaging in effective advocacy to promote those ideas. This is the essence of the freedom of association. *N.A.A.C.P.* v. *Alabama* 357 U.S. 449, 460 (1958).

Appellants have made no showing that the limitation would prevent effective advocacy in any other case. In fact, a persuasive argument can be made that the contribution limita-

tions actually increase, rather than restrict, a contributor's right to associate because the campaign committee functioning in a community with contribution limitations must broaden its fund-raising activity and involve more people in the campaign than a similar campaign in a community without contribution limits. Thus, the individual contributor will have an opportunity to associate with a greater number of persons who have pooled their respective resources in support of a common goal.[37]

In summary, the contribution limitation imposes only an incidental impact on the contributor's freedom of speech and association. It allows the contributor to make contributions totaling $250 in any ballot measure campaign, to make unlimited direct expenditures, and to volunteer his personal efforts without restriction. The overall effect of the limitation is to require campaign committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression. *Buckley* v. *Valeo,* 424 U.S. at 21-22.

III

THE BERKELEY ORDINANCE SERVES THE COMPELLING GOVERNMENTAL INTEREST OF PRESERVING THE INTEGRITY OF AND PUBLIC CONFIDENCE IN THE INITIATIVE.

By eliminating large contributions to ballot measure campaigns, the contribution limitation vindicates state interests in preserving the integrity of the initiative process and sustaining the active alert responsibility of the individual citizen in a democracy for the wise conduct of government. These are clearly interests of the highest importance. *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 788-9 (1977).

In *Bellotti,* the Court stated that "the risk of corruption perceived in cases involving candidate elections (citations

[37] Cf. *Buckley* v. *Valeo* 424 U.S. at 106-7. "Counting only the first $250 of each contribution for eligibility purposes (for federal matching funds) requires candidates to solicit smaller contributions from numerous people . . . The thrust of the legislation is to reduce barriers and to enhance the importance of smaller contributions. (footnotes omitted)."

omitted) simply is not present in a popular vote on a public issue. . ." [38] *Id.* at 790. Subsequent cases involving campaign restrictions in ballot measure campaigns have interpreted this statement to mean that there are no governmental interests that sustain restrictions in ballot measure campaigns. *Let's Help Florida* v. *McCrary,* 621 F.2d 195 (5th Cir. 1980), appeal docketed No. 80-970 (Dec. 8, 1980); *C&C Plywood Corp.* v. *Hanson,* 583 F.2d 421 (9th Cir. 1978). To the contrary, the state interest in maintaining the viability of the initiative process is substantial. California courts have consistently recognized that the initiative is "one of the most precious rights of the democratic process," *Mervynne* v. *Acker,* 189 Cal. App.2d 558, 563, 11 Cal. Rptr. 340 (1961), and a right that must be jealously guarded. *Fair Political Practices Commission* v. *Superior Court (Institute of Governmental Advocates),* 25 Cal.3d 33, 41, 157 Cal. Rptr. 855, 599 P.2d 46 (1979). "The initiative power must be broadly construed, resolving all doubts in favor of the reserved power [of the people]." *Associated Homebuilders* v. *City of Livermore,* 18 Cal.3d 582, 596, 135 Cal. Rptr. 41, 557 P.2d 473. (1976)

The contribution limitation seeks to maintain the initiative as an effective tool of the individual citizen in a democracy, thereby reversing the current trend toward loss of confidence in the political system. It results in broader public participation because committees must broaden their base of support to raise funds for a political campaign. The limitation also has an indirect impact in that more people will participate in the electoral process if they believe their participation, whether in the form of money or services, is significant. It promotes greater diversity in election campaigns because entities that

[38] The City of Berkeley acknowledges that contributions to ballot measure campaigns do not create the same potential for bribery or *quid pro quo* as they do in candidate campaigns. However, in reviewing the interests which may support the state's legitimate effort to regulate ballot measure contributions it is important to note certain facts in *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, that suggest the Legislature had attempted "to give one side of a debatable public question an advantage in expressing its views to the people," 435 U.S. at 785. The Legislature had placed the income tax measure on the ballot four times in recent years and had amended the challenged statute to specify that individual taxation is a subject about which corporations may never make their ideas public. *Id.* at 769-70, n.3.

want to spend substantial amounts of money must make expenditures rather than aggregating their contributions in a single campaign committee. The contribution limitation also promotes the public interest in disclosure, because the identities of entities that communicate directly about the measure will be immediately and effectively disclosed to the voting public.

By restricting the size of contributions, the Berkeley ordinance requires major contributors to communicate directly with the voters instead of giving money to a campaign committee which then converts the funds to speech. If the ordinance has any impact on speech, it is to assure that different views will be presented to the voters rather than restricting the quantity of political debate. Thus, it acts to facilitate and enlarge public discussion and participation in the electoral process, goals that are vital to a self-governing people. *Buckley* v. *Valeo*, 424 U.S. at 92-93.

This Court has consistently stressed the need for debate and communication of different points of view, particularly in the context of an election.

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of... matters relating to political processes. *Mills* v. *Alabama*, 384 U.S. 214, 218-219 (1966).

The Court has long realized that the communication of diverse views, even those resulting in "verbal tumult", "discord", and "offensive utterance" are necessary to maintain the strength of our political system. *Cohen* v. *California*, 403 U.S. 15, 24-25 (1971)

> ... [P]eople will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.... *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976)

Most of the cases in which this Court has reiterated the importance of permitting citizens to receive information from diverse sources have arisen because the state attempted to prevent communication rather than, as in this case, to stimulate debate. Nevertheless, we can conceive of no reason why the basic premise that the truth will emerge from diversity and debate should not be applied to uphold a local ordinance which seeks to encourage and protect the free flow of ideas.

The case of *Miami Herald Publishing Company* v. *Tornillo*, 418 U.S. 241 (1974), is distinguishable because it involved governmental interference with editorial policy of the press, a direct and substantial infringement on protected rights. The statute, if upheld, would have required a newspaper to print what it would not otherwise print and might well have resulted in less political debate instead of more. 418 U.S. at 256-7. In the instant case, all of the speakers remained free to speak and they were not required to communicate anything they would not otherwise have said.

The contribution limitation also serves an important governmental purpose in an informed electorate by increasing disclosure of communications concerning ballot measures.[39] Entities who want to make major disbursements in a ballot measure campaign must make expenditures, rather than contributions. Because political communications state the source of the funds, voters will be able to identify the actual source of the message.[40] In the absence of contribution limitations, most campaign literature and other communications are produced by

---

[39] The legislative findings of the Berkeley Ordinance provide, in part, . . . "the influence of large campaign contributions is increased because existing laws for disclosure of campaign receipts and expenditures have proved to be inadequate." Ord. 4700-N.S. Sec. 101. Campaign committees file periodic campaign disclosure reports disclosing information about receipts and disbursements. California Gov. Code Section 84100 *et seq.* (West 1976) Berkeley Ordinance 4700-N.S., Sections 400 *et seq.* While financial disclosure plays a salutary purpose of informing the voters, the electorate could reasonably conclude that financial disclosure was only a partial measure to remedy the perceived problem. Cf. *Buckley* v. *Valeo*, 424 U.S. at 28.

[40] E.g., Cal.Gov.Code Section 84305 (West 1976) prohibits any person form making an expenditure for a mailing of 200 or more identical pieces of mail unless the outside of each piece and at least one of the inserts includes the sender's name, address and city in no less than six-point type.

campaign committees whose names neither identify individual contributors nor the substance of the measure. The names of some committees do not accurately portray the subject of their concern.[41]

Disclosure of supporters and opponents is particularly important in a ballot measure campaign because a ballot measure, unlike a candidate, is devoid of personality and is not affiliated with a political party. Thus, information concerning who supports or opposes a ballot measure significantly affects voter evaluation of a particular proposal. *Brown* v. *Superior Court (Citizens Against the Street and Road Tax Trap)*, 5 Cal.3d 509, 522, 96 Cal. Rptr. 584, 487 P.2d 1224 (1971). In addition, identification of the source of campaign literature facilitates confrontation and refutation by the opposing parties, thus stimulating political debate. *Canon* v. *Justice Court,* 61 Cal.2d 446, 452-3, 39 Cal. Rptr. 228, 393 P.2d 428 (1964).

Two other cases involving campaign restrictions in ballot measure campaigns have held that the state interest in assuring full disclosure in a ballot measure campaign is not sufficient to sustain contribution limits or prohibitions. In both cases, however, the statutory schemes were sufficiently different from the Berkeley ordinance so as to compel a different result.

Let's Help Florida v. *McCrary,* 621 F.2d 195 (5th Cir. 1980), *appeal docketed,* No. 80-970 (Dec. 8, 1980), invalidated the Florida law limiting contributions to ballot measure campaigns.[42] Like the Berkeley ordinance, the Florida statute limits contributions but does not restrict independent expenditures. Significantly, however, the Florida statute permits contributors to make multiple contributions to any and all committees in a campaign. Thus, a contributor who has made

---

[41] Appellant committee is "Citizens Against Rent Control/Coalition for Fair Housing." In June 1980, the committee opposing another rent control initiative campaigned under the name "Berkeley Fair Housing Committee." "Fair Housing" traditionally refers to the elimination of housing discrimination, not rent control. Cf. Cal. Gov. Code Sections 12900 *et seq.* (West (1980). The salutory purpose of means designed to clarify such representation to the voters cannot be denied. See Cal. Const., Art. 7, Section 8 (West Supp. 1981).

[42] Under Florida Law, contributions to statewide ballot measures are limited to $3,000 and contributions to countrywide measures are restricted to $1,000. Fla. Stat. Ann. Section 106.08(1)(d) and (e) (West Supp. 1980).

the maximum contribution to one committee can simply make another contribution to another committee. The multiple committee provision prevents the Florida statute from furthering the state interest in disclosure for, as the Fifth Circuit observed, "(T)hese multiple committees provide no additional disclosure; the public still sees only the innocuous names of the different committees, and not the identities of the underlying contributors." *Let's Help Florida* v. *McCrary, supra* at 200.[43] In contrast, the Berkeley ordinance places a limit on the total amount of contributions that can be made in an entire campaign, not merely to a committee.

The Ninth Circuit has invalidated a Montana statute that completely prohibited corporate campaign contributions but permitted expenditures. *C & C Plywood Corp.* v. *Hanson*, 583 F.2d 421 (9th Cir. 1978). Rejecting the state's argument that prohibiting contributions while permitting expenditures promotes the state's interest in disclosing the corporate source of political material, the Ninth Circuit held that,

> "... the complete suppression of expression created by the Montana statute is overbroad and impermissible." 583 F.2d at 425.

Unlike the constitutional infirmity identified in *C & C Plywood*, the Berkeley ordinance allows corporations and all other persons to join a campaign association, pool their resources to communicate with the electorate, and participate personally in the campaign, subject only to the $250 contribution limit. In the instant case, the extent to which the ordinance impinges on protected freedoms is substantially less and is, we submit, supported by the state interests at issue.[44]

Amicus Pacific Gas and Electric ("PG&E") asserts that the state interest in reestablishing voter confidence in the initiative

---

[43] *Let's Help Florida* v. *McCrary* 621 F.2d 195 (5th Cir. 1980) is also distinguishable from the instant case because of the extent to which the Florida Statute infringes on protected rights. In contrast to this case, it was undisputed that the contributions limitation prevented the campaign committee from amassing enough funds to carry on an effective campaign. *Let's Help Florida* v. *Smathers*, 453 F. Supp. 1003, 1011 (N.D. Fla. 1978).

[44] *Schwartz* v. *Romnes*, 495 F.2d 844 (2d Cir. 1974) and *Frias* v. *Board of Trustees of Ector County*, 584 S.W.2d 944 (Tex.Civ.App. 1979) are distinguishable from the instant case because the challenged statutes, like *Bellotti*, prohibited all corporate participation in ballot measure campaigns.

through contribution limitations is illusory because a person will still be able to spend large amounts of money on the campaign by making independent expenditures.

> "... if there can be no limit placed upon the right of an individual to spend money in a ballot measure election, it does not make sense to limit the amount that same person can donate to a committee. To do so would be to accomplish an illusory goal." Brief for PG&E as Amicus Curiae at 16

PG&E's argument ignores the balance that our society must strike between the competing interests of different persons. Both state and local campaign reform acts contained expenditure limitations at the time they were passed by the voters. This Court subsequently held that expenditure limitations were invalid, and the California courts followed. *Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Citizens For Jobs and Energy* v. *Fair Political Practices Comm., supra*, 16 Cal.3d 671; *Hardie* v. *Eu, supra*, 18 Cal.3d 371. Expenditure limitations were the most direct way of assuring citizens that their political participation is significant. Expenditure limitations, however, failed to accommodate the rights of persons who wish to spend large amounts of money in campaigns.

Contribution limitations, on the other hand, promote the integrity of the initiative by maintaining diversity of ideas and providing more accurate disclosure without unreasonably infringing on the rights of those who seek to communicate. PG&E is itself a good example of the way that the contribution limitation can promote disclosure without infringing on individual rights. In 1972, there was a measure on the ballot that would have required Berkeley to acquire its own electric generating facilities. Two committees opposed the measure, "Citizens Against Electric Takeover" and "Southwest Berkeley No No No on W." Campaign statements filed by Southwest Berkeley No No No on W Committee reveal that there was only one contributor to that committee, namely PG&E.[45] Under the law, PG&E has the right to spend all it wishes in support of or opposition to any measure, but citizens would

[45] Campaign statements on file with the City Clerk, Berkeley, California. P.G.&E. contributed $7150 to "Southwest Berkeley No No No on W."

have been better informed if the source of the communications had been disclosed as "PG&E" instead of "Southwest Berkeley No No No on W." This is a purpose the contribution limitation seeks to achieve.

The Berkeley contribution limitation is narrowly tailored to address the most serious problem in ballot measure campaigns—large campaign contributions. The limitation does not restrict expenditures; it does not censor content. Instead it applies specifically to campaign committees raising funds for the purpose of influencing voters respecting ballot measures.[46] Moreover, even if the ordinance could be more precisely tailored, the voters were not required to select the least restrictive means of protecting the integrity of the legislative scheme because the limitation does not restrict the ability of individuals to engage in protected political advocacy. *California Medical Assn.* v. *Federal Election Commission*, ____ U.S.L.W. ____(June 26, 1981) slip opinion at 16, n. 20.

CONCLUSION

Berkeley's $250 limitation on contributions to ballot measure campaigns serves to encourage broader public participation in the political process. It promotes greater diversity and disclosure in local ballot measure campaigns, thereby maintaining the initiative as a viable tool by which individual citizens may remedy legislative inaction. The limitation leaves persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent by supporting ballot measure committees with financial resources.

---

[46] Appellant's argument that the lower court decision endangers "political communication and association concerning non-ballot issues" mischaracterizes both the nature of the protected rights and the significance of the governmental interests in this case. (A.B. 33-34). Large campaign contributions made in the context of an election campaign are simply not entitled to the same level of protection as donations to finance a general discussion of issues, even if both can somehow be lumped within the generic term "political." Thus, disclosure of contributions to campaign committees can be required, *Buckley* v. *Valeo* 424 U.S. at 68, but disclosure of dues and non-political contributions to membership organizations cannot be, *Bates* v. *Little Rock*, 361 U.S. 516 (1960).

For the reasons set forth above, appellees respectfully request that the judgment of the California Supreme Court be affirmed.

Respectfully submitted

NATALIE E. WEST
City Attorney
Counsel of Record

CHARLES O. TRIEBEL, JR.
2180 Milvia St.
Fifth Floor
Berkeley, CA 94704
(415) 644-6380
Attorneys for Appellees.

STEVEN L. MAYER
650 California St.
Suite 2900
San Francisco, CA 94108
(415) 434-1600